Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

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CC:ITA:B04
PLR-120011-19

Date:
February 24, 2020

LEGEND

Taxpayer	=
Attorney	=
Company	=
State Z	=
Buyer	=
Expertise	=
X	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=

Dear :

This letter responds to Taxpayer's request dated August 26, 2019. Specifically, Taxpayer requests relief under Treas. Reg. §§ 301.9100-1 and 301.9100-3 for an extension of time under Proposed Treas. Reg. § 1.1400Z2(a)-1(c) to contribute "eligible gains" as defined in Proposed Treas. Reg. § 1.1400Z2(a)-1(b)(2), into a qualified

opportunity fund (QOF), as defined in § 1400Z-2(d) of the Internal Revenue Code (Code).

FACTS

According to information submitted to us, Taxpayer, a calendar year taxpayer, sold his stock in Company, a State Z corporation which had an election in effect under Subchapter S of the Code, to Buyer on Date 1. An election under Code § 338(h)(10) was made with respect to the sale. Taxpayer intended to invest a portion of the gain generated from the sale of stock in Company into one or more QOFs.

Taxpayer sought recommendations for lawyers knowledgeable about the opportunity zone program to assist Taxpayer in making investments in QOFs, and was referred to Attorney, who had Expertise. Attorney has been engaged in the active practice of law for over X years with an emphasis on federal income tax matters. Taxpayer engaged Attorney on Date 2 to assist Taxpayer with investing into one or more QOFs. Taxpayer provided Attorney with all information requested from Taxpayer regarding the prospective investments in QOFs.

Attorney advised Taxpayer on the requirements of the opportunity zone program and assisted in the formation of entities and the preparation of documents. Attorney advised Taxpayer that pursuant to Code § 1400Z-2(a)(1)(A), the period in which to make an investment into a QOF is the 180-day period beginning on the date of the sale (statutory period), Date 1. Thus, the statutory period for taxpayer to invest ended on Date 3.

Attorney advised Taxpayer that a proposed treasury regulation provided another 180-day period for a shareholder in an S corporation to invest in a QOF. Specifically, Proposed Treas. Reg. § 1.1400Z2(a)-1(c) (issued October 29, 2018) provided that if an S corporation has an "eligible gain," as defined in Proposed Treas. Reg. § 1.1400Z2(a)-1(b)(2), but does not invest such gain into a QOF, then the shareholders of the S corporation can invest such gain during the 180-day period beginning with the last day of the S corporation's taxable year. Attorney advised Taxpayer that the taxable year of Company ended on the closing date of the sale, also Date 1, in accordance with the requirements of the Code § 338(h)(10) election. Therefore, the 180-day investment period for Taxpayer, as a shareholder in an S corporation was the same as the statutory period, from Date 1 to Date 3. According to the affidavits and additional information provided, Taxpayer was prepared and intended to fund one or more QOF's by Date 3.

In May 2019, a second set of proposed regulations concerning the qualified opportunity zone program was released. Attorney advised Taxpayer that the second set of proposed regulations provided a separate 180-day period to invest gains derived from the sale of Code § 1231 property. Specifically, Proposed Treas. Reg. § 1.1400Z2(a)-1(b)(2)(iii) (issued May 1, 2019) provided that the 180-day period for Code § 1231 gains began on the last day of the taxable year in which Taxpayer would have recognized the gain, Date 4.

According to the affidavits and additional information provided, Attorney assumed that a majority of the eligible gains from the sale of the Company stock due to the allocation of the purchase price to company assets from the Code § 338(h)(10) election were Code § 1231 gains. Attorney was not engaged to assist with the sale of the Company stock, the preparation of the Code § 338(h)(10) election, or the preparation of the schedule of the allocation of the purchase price from the sale of the Company stock. On Date 5, prior to the expiration of Date 3, Attorney advised Taxpayer to wait until Date 4, the last day of Taxpayer's taxable year, to invest in a QOF. Taxpayer complied with Attorney's advice and did not invest in a QOF during the 180-day investment period that ended on Date 3.

On Date 6, after the expiration of the 180-day investment period that ended on Date 3, Taxpayer received from Buyer a schedule of the allocation of purchase price from the sale of Company stock pursuant to the Code § 338(h)(10) election. The schedule allocated substantially all of the purchase price to goodwill and other intangibles, the sale of which would result in Code § 1221 gains, not Code § 1231 gains. Taxpayer's representatives contacted Attorney upon receipt of the schedule and this ruling request was filed shortly thereafter.

APPLICABLE LAW AND ANALYSIS

Code § 1400Z-2(a)(1)(A) provides that in the case of gain from the sale to, or exchange with, an unrelated person of any property held by the taxpayer, at the election of the taxpayer, gross income for the taxable year shall not include so much of such gain as does not exceed the aggregate amount invested by the taxpayer in a qualified opportunity fund during the 180-day period beginning on the date of such sale or exchange.

Treas. Reg. § 1.1400Z2(a)-1(c)(9)(i) provides that if an S corporation realizes an eligible gain, then rules analogous to the rules for partnerships apply to that entity and to its shareholders. Treas. Reg. § 1.1400Z2(a)-1(c)(8)(iii) provides rules for the 180-day period for a partner in a partnership electing deferral by investing in a qualified opportunity fund. In general, if a partner's distributive share includes an eligible gain, the 180-day period to invest in a qualified opportunity fund with respect to the partner's eligible gains in the partner's distributive share generally begins on the last day of the partnership's taxable year in which the partner's distributive share of the partnership's eligible gain is taken into account under Code § 706(a). A partner may however, elect to treat the partner's own 180-day period with respect to the partner's distributive share of that gain as being the same as the partnership's 180-day period or the 180-day period beginning on the due date for the partnership's tax return, without extensions, for the taxable year in which the partnership realized the eligible gain.

A Code § 338(h)(10) election is an irrevocable joint election, made by the purchaser and seller of an S corporation, on Form 8023 in accordance with the instructions to the form.

The effect of a Code § 338(h)(10) election for federal income tax purposes is that the corporation is deemed to sell its assets and then to have distributed the sales proceeds and liquidated at the end of the closing day.

Treas. Reg. § 301.9100-1(a) provides that the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time to make a regulatory election. Treas. Reg. § 301.9100-1(b) defines the term "regulatory election" as including any election the due date for which is prescribed by a regulation published in the Federal Register. Eligible gain that a shareholder in an S corporation receives is subject to the 180-day investment period described in Treas. Reg. § 1.1400Z2(a)-1(c)(9)(i). Therefore, the election under Code § 1400Z-2(a)(1) to invest into a qualified opportunity fund by a shareholder in an S corporation that receives eligible gain is a regulatory election eligible for relief under Treas. Reg. § 301.9100-3.

Treas. Reg. §§ 301.9100-1 through 301.9100-3 provide the standards that the Service will use to determine whether to grant an extension of time to make a regulatory election. Treas. Reg. § 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered in Treas. Reg. § 301.9100-2) will be granted when the taxpayer provides evidence (including affidavits) to establish that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the Government.

Treas. Reg. § 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Under Treas. Reg. § 301.9100-3(b)(2) a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not –

(i) competent to render advice on the regulatory election; or

(ii) Aware of all relevant facts.

Under Treas. Reg. § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer –

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;

(ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Treas. Reg. § 301.9100-3(c) provides that the Service will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. The interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made.

CONCLUSION

Based on the material submitted, we conclude that Taxpayer's failure to make the election to invest eligible gain into a qualified opportunity fund within the 180-day investment period described in Treas. Reg. § 1.1400Z2(a)-1(c)(9)(i) for shareholders in an S corporation was due to Taxpayer's reliance on the advice given by Attorney, a qualified tax professional employed by Taxpayer for the purpose of providing advice on investing into qualified opportunity funds. Taxpayer's reliance was reasonable since Attorney was competent to render advice on investing in qualified opportunity funds, Taxpayer provided Attorney with all information requested, and Taxpayer did not know that Attorney was not aware of all relevant facts.

Taxpayer is not using hindsight in requesting relief. Moreover, Taxpayer requested relief before the failure to make the election was discovered by the Service. Finally, Taxpayer acted reasonably and in good faith, and the interests of the Government will not be prejudiced by the granting of relief under Treas. Reg. § 301.9100-3. Accordingly, Taxpayer's investment of eligible gains as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(11) from the sale of the Company stock into one or more qualified opportunity funds during the 180-day period beginning on Date 4 is deemed timely and may be a qualifying investment as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(34) provided a proper deferral election is made by Taxpayer in accordance with Code § 1400Z-2 and the regulations thereunder.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

This ruling is based upon information and representations submitted by the Taxpayer and Attorney and accompanied by a penalty of perjury statement signed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, we have no opinion, either express or implied, concerning whether any gain generated from the sale of Company is an eligible gain as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(11) or whether investments made by Taxpayer into funds are qualifying investments as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(34).

This ruling is directed only to the taxpayer requesting it. Code § 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the provisions of a power of attorney on file with this office, a copy of this letter is being sent to Taxpayer's authorized representative.

Sincerely,

Ronald J. Goldstein
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Income Tax and Accounting)

cc: